

ORIGINAL

FILED

September 16 2009

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

**JAMES D. MOORE**  
**ATTORNEY AT LAW**  
30 5<sup>th</sup> Street East, Suite 201  
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Kalispell, Montana 59903  
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Email: [moorelaw@centurytel.net](mailto:moorelaw@centurytel.net)

Attorney for Defendant and Appellant,  
**JAMES R. MOSTI**

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**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Supreme Court Cause No. DA 09-~~DA 09~~-0505

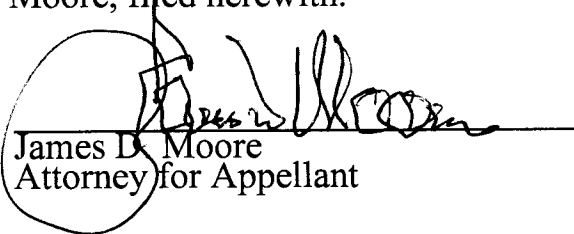
**CACV OF COLORADO, LLC,**  
**Plaintiff and Appellee,**  
  
**vs.**  
  
**JAMES R. MOSTI,**  
**Defendant and Appellant.**

**MOTION TO REINSTATE AND  
FILE APPEAL**

**COMES NOW the Appellant, JAMES R. MOSTI,** and moves the Court for an order reinstating Appellant's filing of its appeal on September 2, 2009 as timely.

This Motion is made for the reasons and upon the grounds that said filing was timely, based upon the Montan Rules of Civil Procedure and the Montana Rules of Appellate Procedure, as set forth in the Memorandum in Support of Motion and the Affidavit of Appellant's Attorney, James D. Moore, filed herewith.

DATED: September 15, 2009.

  
James D. Moore  
Attorney for Appellant

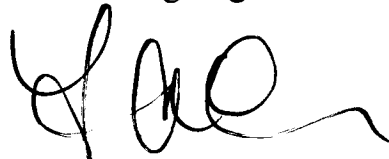
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have filed a true and accurate copy of the foregoing  
3 AMENDED NOTICE OF APPEAL with the Clerk of the Montana Supreme Court;  
4 and that I have served true and accurate copies of the foregoing NOTICE OF APPEAL  
upon the Clerk of the District Court, each attorney of record, and each party not  
represented by an attorney in the above-referenced district Court action, as follows:

5 Charles Dendy  
6 JOHNSON, RODENBURG & [ ☒ ] U.S. Mail (first class postage)  
LAUINGER [ ] Hand Delivery  
7 1004 East Central Avenue [ ]  
Bismark, ND 58501-1936 [ ] Other  
8 *Attorney for Plaintiff/Appellee*

9 I declare under penalty of perjury that the foregoing is true and correct.

10 Executed on September 15, 2009.

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13 Teri Ann Lawler  
14 Paralegal  
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**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Supreme Court Cause No. DA 09- DA09-0505

**CACV OF COLORADO, LLC,**  
**Plaintiff and Appellee,**  
**vs.**  
**JAMES R. MOSTI,**  
**Defendant and Appellant.**

**MEMORANDUM IN SUPPORT OF  
MOTION TO REINSTATE AND  
FILE APPEAL**

Appellant, JAMES R. MOSTI, hereby submits the following Memorandum in Support of Motion to Reinstate and File Appeal.

Under Rule 4(5)a.i., M.R.App.P., a party to a civil action has thirty (30) days from notice of entry of judgment to file a notice of appeal. Where, as here, notice of entry of judgment is "required to be filed under M.R.Civ.P. 77(d)," the 30 days shall not begin until service of the Notice of Entry of Judgment.

Under Rule 6(e), M.R.Civ.P., whenever a party is required to give notice by statute, and does so by mail, three (3) days is added to the prescribed time. The day of the filing or notice is not to be included under Rule 6(a), M.R.Civ.P. Rule 6 applies to notice of entry of judgment. *Lewistown Propane Co. v. Utility Builders, Inc.* (1976), 170 Mont. 292, 552 P.2d 1100.

In the case at bar, we know that the Notice of Entry of Judgment was dated July 30, 2009. We do not know when it was sent, but we know that it was not "filed"

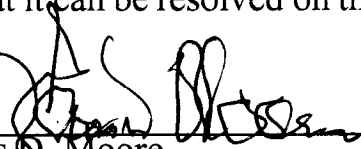
1 with the District Court, as that term is used in Rule 4(5)a.i., until August 3, 2009.

2 Under the Rules, if the Notice was sent on July 30<sup>th</sup>, despite not having been  
3 filed until August 3<sup>rd</sup>, and was considered to have been legally effective on that date  
4 despite the lack of filing, the last day of the three days mailing time would have been  
5 Sunday, August 2<sup>nd</sup>. That is a day on which mail is not received, but it should not  
6 matter as that date should have been excluded from the period of time prescribed by  
7 the rules for the filing of an appeal in this matter under Rule 3, M.R.App.P., such that  
8 the Appellant's 30 day appeal period would have begun on Monday, August 3<sup>rd</sup>, the  
9 date the Plaintiff actually filed his Notice of Entry of Judgment.

10 The final day of Appellant's 30 day period during which he could appeal  
11 would have been Wednesday, September 2<sup>nd</sup>. The Appellant fax filed his Notice of  
12 Appeal to the Supreme Court on Monday, August 31<sup>st</sup>, but now understands that fax  
13 filing will not be permitted until October 1<sup>st</sup>, when the new rules become effective.  
14 The hard copy Notice of Appeal was sent the same date, and was received by the  
15 Clerk of the Supreme Court on September 2<sup>nd</sup>, which should have been the last day  
16 of the prescribed period.

17 Under these facts, the Appellant's Notice of Appeal should be regarded as  
18 timely and his appeal should be reinstated, such that it can be resolved on the merits.

19 DATED: September 15, 2009.

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21 James D. Moore  
22 Attorney for Appellant  
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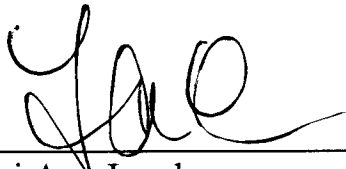
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LAUINGER [ ] Hand Delivery  
7 1004 East Central Avenue [ ]  
Bismark, ND 58501-1936 [ ] Other  
8 *Attorney for Plaintiff/Appellee*

9 I declare under penalty of perjury that the foregoing is true and correct.

10 Executed on September 15, 2009.

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14 Paralegal  
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CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Attorney for Defendant and Appellant,  
JAMES R. MOSTI

**Supreme Court Cause No. DA 09-~~DA09~~-0505**

**AFFIDAVIT IN SUPPORT OF  
MOTION TO REINSTATE AND  
FILE APPEAL**

6. That it was your Affiant's belief that Appellant had until September 2, 2009, within which to file his Notice of Appeal.

James D. Moore

SUBSCRIBED AND SWORN TO before me this 19th day of Sept, 2009.



TERI ANN LAWLER  
NOTARIAL SEAL  
STATE OF MONTANA

RESIDING AT COLUMBIA FALLS, MT  
MY COMMISSION EXPIRES: OCTOBER 07, 2012

Notary Public for the State of Montana  
TERI ANN LAWLER  
(Printed Name)

Residing at COLUMBIA FALLS

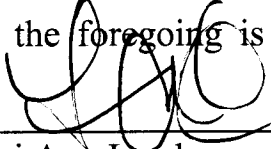
My Commission Expires: 10-7-2012

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